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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1959

OBEDIAH GENTRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Giordenello v. *United States*, 357 U.S. 480	4, 5
Harris v. *United States*, 331 U.S. 145	6
United States v. *Jones*, 258 F. 2d 471, certiorari denied, 358 U.S. 880	6
Latham v. *United States*, 259 F. 2d 393	4
Marron v. *United States*, 275 U.S. 192	6
Shew v. *United States*, 155 F. 2d 628, certiorari denied, 328 U.S. 870	6
United States v. *Robinowitz*, 339 U.S. 56	6

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OPINION BELOW

The opinion of the Court of Appeals (R. 23-24; Pet. App. A) is reported at 268 F. 2d 63.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1959 (R. 25). By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to August 14, 1959 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's arrest pursuant to warrant, which was not challenged in the courts below, was valid.

2. Whether the District Court properly found that the arrest was not merely a pretext to search.

3. Whether incident to an arrest for liquor offenses it was proper to search a garage from which the odor of whisky emanated.

STATEMENT

In the United States District Court for the Middle District of North Carolina, petitioner was convicted by the court on three counts charging violations of the liquor laws. He was sentenced to imprisonment for fifteen months and to pay a fine of $500 (R. 2-3). His conviction was affirmed on appeal (Pet. 11-12).

It was agreed that petitioner's conviction depended on the admissibility of evidence procured by a search incident to his arrest (Tr. 65),[1] which was the subject of a pre-trial motion to suppress. The evidence on the motion was as follows:

On September 30, 1958, Mr. Carter, an Investigator of the Alcohol Tobacco and Tax Unit, filed a complaint with the United States Commissioner, alleging that on July 1, 1958, petitioner and another possessed, removed, concealed, and sold 60 gallons of non-tax-paid whisky. The complaint stated that

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[1] "Tr." refers to the transcript on the motion to suppress, which is being lodged with the Clerk of this Court.

Carter and one Snuggs were material witnesses (Pet. App. B). Carter testified that the complaint was not filed until the end of September because Mr. Snuggs was engaged in an undercover campaign, and disclosure of his identity would have jeopardized his activities (Tr. 51-53). The arrest warrant was issued (Pet. App. C).

During the evening of October 1, 1958, Carter gave the warrant to Mr. Schmidt, another investigator, who with three others was assigned to maintain a lookout for a load of whisky in the early morning hours of October 2. Carter told Schmidt that, after completion of that assignment, the agents should execute the warrant for petitioner's arrest (Tr. 53).

After daylight, at about 6:30 a.m. on October 2, the four agents went to petitioner's home and knocked on the front door. Petitioner came out of the side door. Two of the investigators stationed at the side door read the warrant to petitioner and placed him under arrest (Tr. 3, 4, 20, 23). Petitioner had a garage located about five to ten feet from the side door of his home. One of the investigators, Mr. Berry, said that as he went to the side door he detected the odor of non-tax-paid whisky coming from the garage (Tr. 5-6, 7, 15, 17, 33-35). He testified that illegal whisky had a distinctive odor (Tr. 34-35; see also Tr. 9).

After petitioner's arrest, the investigators searched petitioner's home and found nothing (Tr. 6). One of the officers, Mr. Schmidt, checked outside. Near the garage he, too, detected the odor of illegal

whisky. The garage was locked. After petitioner refused to give the officers the key to the garage, they forced open the door (Tr. 6-8). In the garage, they found 3 quarts of whisky, contained in 2 one-half gallon fruit jars, with no federal tax stamps attached thereto, 22 empty 5-gallon cans bearing the odor of whisky and containing the residue of whisky, two zinc tubes, one pail, one filter pan, two felt filter bags which were still wet with whisky, and 13 empty one-half gallon fruit jars (Tr. 10-11). Most of this equipment is generally used for manufacturing alcohol (Tr. 11-12).

ARGUMENT

1. Although no issue with respect to the validity of the warrant of arrest, or of the arrest, was raised in the District Court or the Court of Appeals (see Pet. 2), petitioner now argues that the complaint on which the warrant was issued was deficient under *Giordenello* v. *United States*, 357 U.S. 480, and that on this ground the Court should now review the judgment of the Court of Appeals. The complaint here was, however, different from that in *Giordenello* since in this case the sources of information (*i.e.*, the names of the material witnesses) appear on the face of the complaint (Pet. App. B). See *Latham* v. *United States*, 259 F. 2d 393, 398 (C.A. 5). Because of petitioner's failure to raise any issue as to the validity of the warrant, the circumstances that led the agent, Carter, to seek the warrant are not developed in the record, but the record does suggest that he had some personal knowledge as well as in-

formation conveyed to him by the undercover agent, Snuggs, who is specifically named in the complaint (see Tr. 55, 58). Moreover, petitioner's failure to contest the validity of the warrant made it unnecessary for the government to explore the issue of whether the agents who made the arrest knew of the activities which led to the issuance of the warrant, and thus had reasonable cause to arrest petitioner without a warrant. Since, therefore, petitioner's failure to make his contentions in the District Court precluded full development of factual issues, his present contention comes too late. *Giordenello* v. *United States*, 357 U.S. 480, 487-488.

2. Petitioner renews the contention, made in the courts below, that the arrest was merely a pretext to search since the agents could have arrested petitioner at his store. The District Court, by overruling the motion to suppress, found against petitioner on this factual issue, and the record supports that finding. The arrest was made pursuant to a warrant obtained on the basis of activities uncovered some time before. The delay in filing the complaint was explained as necessary to avoid disclosure of the activities of an undercover agent (Tr. 51-53), *supra*, p. 3. The agent in charge, Carter, testified that, when the warrant was obtained, he was engaged in investigating other violations some distance away, and for that reason did not participate in the arrest (Tr. 59). He gave the warrant to agents who were assigned to duty on the night of October 1, and told them to execute the warrant when they had finished their assignment (Tr. 53). The agents executed the war-

rant in the daylight hours of October 2. They searched the garage because they detected the odor of whisky emanating therefrom. In short, the arrest was valid and routine, and the search was incidental to that valid arrest. See *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880.

3. Petitioner's contention that the search of the garage was beyond the area of permissible search incident to the arrest was properly overruled in the light of the circumstances presented by this record. The garage was in the back, so close to the house as to be, for all practical purposes, part thereof. The agents smelled the odor of whisky coming from the garage at a time when they were arresting petitioner for a previous liquor violation. There is no doubt that, if the garage were attached to the house, the officers would have been justified, under these circumstances, in searching the whole house including the garage, even if a room or the garage were locked. *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145, 152. The fact that the garage was detached from the house by five or ten feet is not a material difference. The garage was under the possession and control of the petitioner and part of his curtilage. It was therefore properly within the area subject to a search incident to an arrest for the type of crime here involved. *Harris* v. *United States*, 331 U.S. 145, 152; *Marron* v. *United States*, 275 U.S. 192, 199. See also *Shew* v. *United States*, 155 F. 2d 628 (C.A. 4), certiorari denied, 328 U.S. 870, where a smoke-house was treated as part

of the premises subject to a search incident to an arrest for a liquor violation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

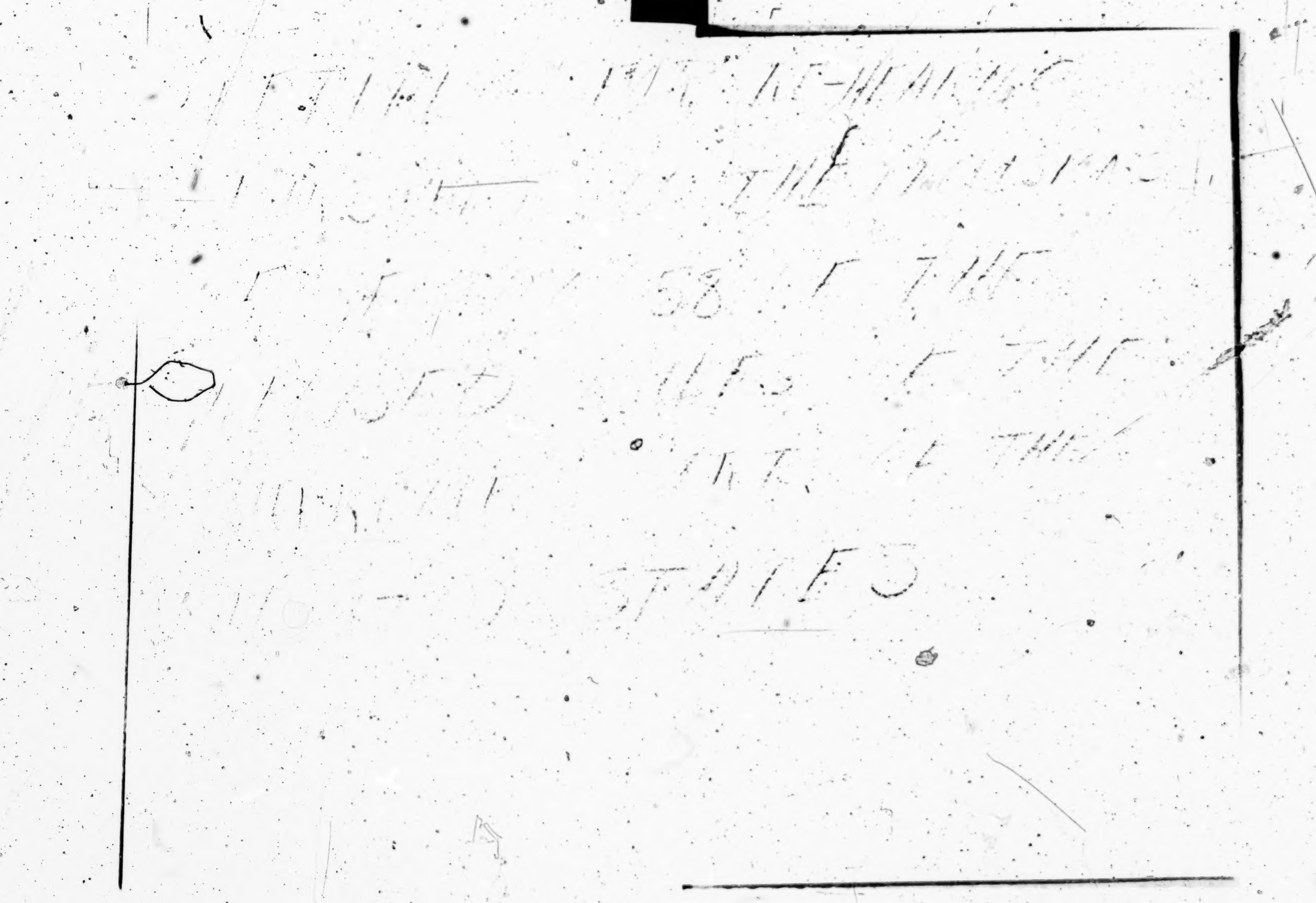
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SEPTEMBER 1959.

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Petitioner

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Respondent

PETITION FOR RE-HEARING PURSUANT TO THE PROVISIONS OF SECTION 58 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR RE-HEARING PURSUANT TO THE PROVISIONS OF SECTION 58 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

This is a petition by Obediah Gentry for a re-hearing of the denial of certiorari by the Supreme Court of the United States pursuant to Section 58 subparagraph to the revised rules of the said Court. The petitioner respectfully shows this honorable Court as follows:

The Court erred in denying certiorari to the petitioner by overlooking that the petitioner was denied "due process" and deprived of his civil liberties and that he was denied the equal protection of the law which had heretofore been given

people of the white race by decisions of this court in the case of *Giordenello* v. *United States*, 357 U. S. 480.

The petitioner respectfully contends that had he been of the white race that, in the first instance, the members of the Alcohol and Tobacco Tax Unit would not have used the warrant obtained three days prior to service, based on an alleged violation having occurred 90 days prior thereto, as a pretext to enter his home and the privacies of his private dwelling, but knowing that he was of the negro race used the same in the manner to obtain entrance into his private dwelling and thus deprived him of due process of law and equal protection of the law as guaranteed to him.

Much has been said about the right of the Negro race to civil liberties relating to the voting franchise, but what hollow sounding words are "civil liberties" relating to the franchise when the security of the negro and his family within the curtilage of his home invaded by officers on the pretext of arresting him and searching for evidence of his guilt of some crime and then be permitted to hide behind an illegal arrest warrant which this court has held must meet all the requirements of a search warrant before the same can be used to search and discover evidence against the lord of the house, whether it be a humble hovel on the mountainside or a palace with all the trimmings that money could buy.

The record indicates that the petitioner has heretofore been denied due process and that he has been denied the equal protection of the law in that all his defenses have been swept out and he is now facing sentence when in truth and fact if he had been granted the protection he is justly entitled to the warrant under which he was arrested and his premises searched would have been quashed. Under

those circumstances this Court in the exercise of judicious discretion must of necessity apply the law applicable to the facts in this case and grant certiorari to the end that this petitioner's civil liberties may be preserved and he may be given the equal protection of the law to which men of all races, all colors and all creeds are entitled.

It will be recognized as a fundamental law of the land and as due process that the arrest in this case was made without a search warrant. The seizure of the nontaxpaid whiskey was admissible in evidence only if it's seizure was incident to a lawful arrest and in this case the complaint does not state sufficient information to show the probable cause required for the issuance of a warrant of arrest under Rule 4, of the Federal Rules of Criminal Procedure.

The Fourth Amendment provides that no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the person or thing to be seized. This course applies to the arrest as well as a search warrant and stands behind these rules requiring sufficient information in the complaint for independent judgment of probable cause by the issuing magistrate or commissioner, which was lacking in Gentry's case and which resulted in depriving him of the due process of law.

WHEREFORE this petition for re-hearing should be granted.

Respectfully submitted.

R. KYLE HAYES
Hayes Building
North Wilkesboro, N. C.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, R. Kyle Hayes, counsel for the petitioner in the above entitled cause, do certify that the Petition for Rehearing filed in this cause is presented in good faith and not for delay and is restricted to paragraph 2 of Section 58 of the revised rules of the Supreme Court of the United States.

R. KYLE HAYES

Counsel for Petitioner